UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

GLENVIEW SENIOR LIVING CENTER, LLC[1] Employer and	CASE NO. 8-RC-16806
DISTRICT 1199, THE HEALTHCARE AND SOCIAL SERVICE UNION, SEIU Petitioner	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(a) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board (the Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in the proceeding to the undersigned.[2]

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time restorative aides, maintenance employees, certified nursing aides, state-tested nursing assistants, nursing aides, dietary aides, dietary cooks, cafeteria employees, activities employees, medical records employees, housekeepers, laundry aides, transporters, and central supply employees employed by the Employer at its 3379 Main Street, Mineral Ridge, Ohio facility, excluding all full-time and regular part-time Registered Nurses, Licensed Practical Nurses, hairstylists, department heads, administrators and all professional employees, guards and supervisors as defined in the Act.

[1] The Employer's name appears as amended at the hearing.

[2] The parties filed post-hearing briefs that have been carefully considered. Upon the entire record in this case, the undersigned finds: the hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction. SEIU District 1199, The Health Care and Social Service Union, SEIU (Petitioner) is a labor organization that claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(i) and 2(6) and (7) of the Act.

The Employer operates a skilled nursing care facility in Mineral Ridge, Ohio. There are approximately 90 employees in the unit found appropriate.

I. ISSUES

The issues here are: (i) whether Glenview Senior Living Center LLC is the employer; (ii) whether the employees have a reasonable expectation of future employment with Glenview Senior Living Center LLC, and (iii) whether the Medical Records employee should be included in the unit found appropriate. The Employer asserts that Glenview Manor, Inc., debtor-in-possession is the true employer. In the alternative, the Employer contends that Glenview Senior Living Center LLC and Glenview Manor, Inc., debtor-in-possession comprise the true employer. The Employer further argues that because of a pending sale approved by the Bankruptcy Court, and the possibility of a license revocation by the State of Ohio, the present employees have no expectation of future employment with Glenview Senior Living Center, LLC. Finally, the Employer asserts that the Medical Records Clerk does not possess a sufficient community of interest with the other unit employees as to warrant her inclusion in the unit found appropriate herein. The Petitioner contends that Glenview Senior Living Center, LLC is the appropriate employer, that the issue of future employment is too speculative to require dismissal of the petition, and that the Medical Records clerk shares a sufficient community of interest with other employees to warrant her inclusion.

II. DECISION SUMMARY

For the reasons set forth below, I find that Glenview Senior Living Center, LLC is the Employer within the meaning of Section 2(2) of the National Labor Relations Act. I further find that the employees' expectation of future employment with this Employer is sufficient to warrant the direction of an election in this proceeding. Finally, I find that the medical records clerk has a community of interest with the petitioned-for employees and should be included in the unit found appropriate.

III. BACKGROUND

The employees in the unit found appropriate work at a facility known as Glen View Manor, Inc. Glen View Manor, Inc. and its related debtor entities are involved in a Chapter 11 Bankruptcy proceeding. On February 1, 2006, the United States Bankruptcy Court for the Northern District of Ohio issued an Order approving the sale of certain Glen View Manor, Inc. assets to a corporation named "Briarfield of Mineral Ridge, LLC". Also, on February 1, 2006 a Management Agreement was entered into between Glen View Manor, Inc. and Glenview Senior Living Center, LLC. Glenview Senior Living Center LLC and Briarfield of Mineral Ridge, LLC have identical corporate officers. It appears that Glenview Senior Living Center LLC was created by Briarfield of Mineral Ridge, LLC for the express purpose of managing the business of Glen View Manor, Inc.

John DePizzo is the President of Briarfield of Mineral Ridge, LLC, and Jerald DePizzo is the Chief Operating Officer. Glenview Senior Living Center, LLC assumed actual control of Glen View Manor, Inc.'s employees on February 24, 2006. Prior to engaging Glenview Senior Living Center, LLC to manage the facility, Glen View Manor, Inc. had utilized LTC Solutions as a managing entity. The record indicates that Glen View Manor, Inc. was dissatisfied with the performance of LTC Solutions and changed management companies.

The Management Agreement grants Glenview Senior Living Center, LLC absolute control over wages, hours, terms and conditions of employment. Jerald DePizzo is now in control over the day-to-day operations of the nursing home. Since February 24, 2006 he has made several changes to the terms and conditions of employment. DePizzo issued a memo dated February 24, 2006 requiring all employees to telephone him on his cell phone in the event of a "call-off". Jerald DePizzo subsequently instituted twelve hour shifts for direct-care employees.

The record shows that Glen View Manor, Inc. still maintains various bank accounts for the operation of the nursing home. However, the record makes clear that the current signatories on those accounts all work for Glenview Senior Living Center, LLC.

The record indicates that the sale of the nursing home from Glen View Manor, Inc. to Briarfield of Mineral Ridge, LLC has not been completed. Nor has a firm date been established for the closing of the sale. One reason the sale did not close was the necessity of having the property resurveyed. A second reason involves a problem with the license being transferred. Glen View Manor, Inc. has received three substandard care surveys from the Ohio Department of Health. A fourth substandard care survey will result in the loss of the license according to record testimony from Jessica Price, attorney for the debtor-in-possession, Glen View Manor, Inc. It appears from the record, however, that the Employer is actively working to address all of the concerns raised by the surveys conducted by the Ohio Department of Health. The record makes it clear that it is presently impossible to predict with any degree of certainty the final outcome of the Ohio Department of Health surveys.

IV. ANALYSIS

Section 2(2) of the National Labor Relations Act states: "The term employer includes any person acting as an agent of an employer, directly or indirectly…." Based on the above-noted facts I find that Glenview Senior Living Center, LLC is an employer within the meaning of Section 2(2) of the Act. I note that Petitioner did not choose to amend its petition to allege a joint employer relationship between Glen View Manor, Inc. and Glenview Senior Living Center, LLC.

In Chesapeake Foods, 287 NLRB 405, 407 (1987), the Board framed its test for determining joint employer status in this manner:

> Whether two separate entities share or codetermine "those matters governing the essential terms and conditions of employment" and to establish such status "there must be a showing that the [alleged joint employer] meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."

In the instant matter, no such finding can be made. There is no probative evidence that Glen View Manor, Inc. has any meaningful role in determining the essential terms and conditions of employment. In fact the evidence is all to the contrary. The Management Agreement itself vests Glenview Senior Living Center, LLC with full control of employment issues. I find it particularly significant that Glenview Senior Living Center, LLC employs its own on-site supervisor, Jerald DePizzo, who is responsible for direction and control of the workforce. While perhaps not determinative, the Board has long found similar supervision and control to carry great weight in making a finding that no joint employer relationship exists. International Shipping Association, 297 NLRB 1059, 1067-1068 (1990).

The Employer's second joint employer argument relies on the application of the Board's decision in Oakwood Care Center, 343 NLRB 76 (2004) to the present facts. Oakwood Care Center can be distinguished from the instant case. Two employers were involved in Oakwood Care Center, Oakwood and N&W. Some of the employees were solely employed by Oakwood and other employees were jointly employed by Oakwood and N&W. Oakwood and N&W together determined the pay and the benefits of the jointly employed employees. The Board held that in such a situation a multi-employer unit existed and the consent of both employers was necessary before the unit would be permissible.

In this case there is no evidence that Glen View Manor, Inc. retained any control over the pay and benefits of the employees, accordingly Oakwood Care Center does not apply. The Employer notes that there is an agreement with an outside staffing firm to provide staff on different nights because of shortages. The record does not reveal the identify of the staffing company, the number of temporary employees, or the classifications occupied by these workers. Moreover, the record does not indicate who determines the wages and benefits of these temporary workers. Based on the vague evidence concerning these temporary workers I find no basis for applying Oakwood Care Center's holding to the present situation.

Finally, the Employer has urged that I dismiss the petition because of questions connected to the continued employment of employees in the proposed unit. First, the Employer suggests that there is no guarantee that the purchaser of the nursing home will retain the current workforce. Second, the Employer suggests the possibility of the bankruptcy sale failing to close, allowing another bidder to purchase the nursing home. Third, the Employer speculates that the Ohio Department of Health may revoke the license necessary for the bankruptcy sale to close. Fourth, the Employer notes the possibility that Glenview Senior Living Center, LLC may be terminated as the

management company after the bankruptcy sale closes. Fifth, the Employer asserts that the assets of Glen View Manor, Inc. may be liquidated if the bankruptcy sale does not close. The Employer has not cited any Board decisions where the possibility of any of the above scenarios unfolding has resulted in the dismissal of a representation case petition. Accordingly, I reject all of the asserted grounds for dismissing the petition because they are too speculative, and there is no precedent.

The Medical Records Clerk

The Employer asserts that the Medical Records employee, Tamika Gilbert[3] should be excluded from the unit because she does not share a sufficient community of interest with the other employees in the unit found appropriate.

When determining inclusion in an appropriate unit the Board applies a community of interest test. Under that test, the Board analyzes the bargaining history, functional integration, employee interchange, employee skills, work performed, common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. J.C. Penney Co., 328 NLRB 766 (1999); Armco, Inc., 271 NLRB 350, 351 (1954). No one of the above factors has controlling weight and there are no per se rules to include or exclude any classifications of employees in any unit. Airco, Inc., 273 NLRB 348 (1984).

The unit found appropriate is comprised of service and maintenance employees. The Medical Records clerk (who is also an STNA, State Tested Nursing Assistant), shares a sufficient community of interest with the other employees to be included in the appropriate unit.

Gilbert is presently the only employee in the Medical Records Department. She keeps track of all the medical records, admissions, and discharges. Gilbert also updates the charts with new information and tracks the census of patients in the building. Record testimony indicates that Gilbert has contact with the residents in the building on a day-to-day basis. Ordinarily Gilbert does not provide any hands-on care, however, during the six weeks prior to the hearing, she worked once on the floors as an STNA.

The record indicates that the Medical Records Clerk is paid hourly, as are all the other employees included in the appropriate unit. The record does not contain any other information concerning Gilbert's benefits, activities or supervision. Nor does it appear that this employee has any of the duties typical of a business office clerical.

The Employer cites St. Luke's Episcopal Hospital, 222 NLRB 674, 675 (1976), for the proposition that the Medical Records clerk does not have a community of interest with the other employees in the appropriate unit. Two facts distinguish St. Luke's from the case at hand. One, the Petitioner in St. Luke's did not seek the inclusion of the clericals in the medical records department. Two, the St. Luke's decision issued before the Board's rulemaking in the health care industry.

[3] The Employer in its post-hearing brief suggests that the employee's name is Taminika Galbreath.

The Board has more typically included the medical records clericals in a service and maintenance unit. William W. Backus Hospital, 220 NLRB 414, 415 (1975).

The Backus Board stated the following:

> "The medical records employees at Backus, similar to those at Sisters of St. Joseph of Peace, 217 NLRB No. 135 (1975), deal primarily with patient's medical records rather than the types of records dealt with by business office employees. They work closely with physicians to construct and maintain permanent patient records, and, in addition, have substantial contact with service and maintenance employees. Accordingly, we find that the medical records employees have a significant community of interest with the service and maintenance employees and shall therefore include them in the service and maintenance unit." Ibid. at page 415.

More recently, in Marian Manor for the Aged, 333 NLRB 1084, 1091, 1094-1095 (2001), the Board included medical records secretaries in a service and maintenance unit. Significantly, that case was decided after Park Manor Care Center, 305 NLB 872 (1991) where "the Board ruled that the proper test for determining the appropriateness of bargaining units in non-acute care health care institutions is the "empirical community of interest test". Under that test, the Board considers community of interest factors, as well as those factors considered relevant by the Board in its rule making proceedings on Collective Bargaining Units in the Health Care Industry. Marian Manor for the Aged, p. 1094. Final Rule, 54 Fed. Reg. 16336 (1989) reprinted at 284 NLRB 1580 and codified at Sec. 103.30 of the Board's Rules.

The Board has distinguished between business office clericals and other clericals, consistently including the latter in service and maintenance units in facilities where they have contact with the service and maintenance unit. See Marian Manor for the Aged, supra. On the basis of this precedent and given the foregoing factual considerations, I find that the medical records clerk shares a community of interest with proposed unit employees and should be included in the unit found appropriate.

The parties stipulated that the following named individual is ineligible to vote in the election:

Joseph Ketchaver - Administrator

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible

to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have note been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by District 1199, The Healthcare and Social Service Union, SEIU.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by May 15, 2006.

DATED at Cleveland, Ohio this 1st day of May, 2006.

/s/ [Frederick J. Calatrello]

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8